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No.: **ICC-01/04-01/07**
Date: **13 November 2008**

TRIAL CHAMBER II

Before: Judge Bruno Cotte, Presiding Judge
Judge Fatoumata Dembele Diarra
Judge Fumiko Saiga

**SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO
IN THE CASE OF**

***THE PROSECUTOR v. GERMAIN KATANGA AND MATHIEU NGUDJOLO
CHUI***

Public Document

**Order Instructing the Participants and the Registry to Respond to Questions of
Trial Chamber II for the Purpose of the Status Conference (article 64(3)(a) of the
Statute)**

Source: Trial Chamber II

Document to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

The Office of the Prosecutor

Mr Luis Moreno-Ocampo, Prosecutor
 Ms Fatou Bensouda, Deputy Prosecutor
 Mr Éric MacDonald, Senior Trial Lawyer

Counsel for Germain Katanga

Mr David Hooper
 Ms Caroline Buisman

Counsel for Mathieu Ngudjolo Chui

Mr Jean-Pierre Kilenda Kagengi Basila
 Mr Jean-Pierre Fofé Djofia Malewa

Legal Representatives of the Victims

Ms Carine Bapita Buyangandu
 Mr Joseph Keta
 Mr Jean-Louis Gilissen
 Mr Hervé Diakiese
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Legal Representatives of the Applicants

**The Office of Public Counsel for
 Victims**

Ms Paolina Massidda

**The Office of Public Counsel for the
 Defence**

States' Representatives

Amicus Curiae

REGISTRY

Registrar

Ms Silvana Arbia

Defence Support Section

Victims and Witnesses Unit

Mr Simo Vaatainen

**Victims Participation and Reparations
 Section**

Ms Fiona McKay

1. By order issued on 6 November 2008,¹ Trial Chamber II of the International Criminal Court (“the Chamber” and “the Court”, respectively) convened a status conference pursuant to rule 132 of the *Rules of Procedure and Evidence* (“the Rules”).
2. In that same order, the Chamber deemed that it was appropriate to obtain information from the participants in the proceedings as well as from the Registry that may assist the Chamber in conducting this first status conference effectively.
3. Pursuant to article 64(2) and 64(3)(a) of the *Rome Statute* (“the Statute”) and regulation 28(2) of the *Regulations of the Court*, the Chamber hereby addresses a list of questions to the participants and the Registry accordingly.
4. The Chamber requests the participants and the Registry to initially submit to the Chamber a document in writing concisely setting out their answers to the questions asked (“the Written Response”), upon which they shall expatiate orally at the status conference convened for this purpose.
5. The Chamber further invites the participants and the Registry to add a second part to their Written Response setting out the issues and observations which they would deem relevant and on which they would like the Chamber to rule. However, the Chamber recalls that a number of issues relating to the conduct of proceedings before the Court have already been settled, notably by the Appeals Chamber, Trial Chamber I and Pre-Trial Chamber I in the present case and in the case of *The Prosecutor v. Thomas Lubanga Dyilo*.

¹ *Ordonnance fixant la date d’une conférence de mise en état (règle 132 du Règlement de procédure et de preuve)*, 6 November 2008, ICC-01/04-01/07-739.

6. This includes issues pertaining to release or continued detention,² the use of article 54(3)(e) of the Statute,³ *ex parte* proceedings,⁴ redactions⁵ and victim participation.⁶

7. Further to its obligation under article 64(2) of the Statute to ensure that proceedings are conducted expeditiously, the Chamber takes note of legal principles and rules so established and does not, in principle, intend to revisit them.

8. Furthermore, the Chamber informs the accused that, pursuant to article 64(8)(a) of the Statute read together with article 67(1)(a) of the Statute, the charges previously confirmed by Pre-Trial Chamber I shall be read to them at the first status conference and that they shall have the opportunity to make an admission of guilt in accordance with article 65 of the Statute or to plead not guilty. The Chamber would like to point out that it will read the charges again and will afford the accused a further opportunity to make an admission of guilt or to plead not guilty at the commencement of the hearings on the merits.

² Appeals Chamber, *Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I entitled "Decision on the release of Thomas Lubanga Dyilo"*, 21 October 2008, ICC-01/04-01/06-1487.

³ Appeals Chamber, *Judgment on the appeal of the Prosecutor against the decision of the Trial Chamber I entitled "Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008"*, 21 October 2008, ICC-01/04-01/06-1486.

⁴ Appeals Chamber, *Judgment on the Prosecutor's appeal against the decision of Pre-Trial Chamber I entitled "Decision Establishing General Principles Governing Applications to Restrict Disclosure pursuant to Rule 81(2) and (4) of the Rules of Procedure and Evidence"*, 13 October 2006, ICC-01/04-01/06-568.

⁵ Appeals Chamber, *Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I entitled "First Decision on the Prosecution Request for Authorisation to Redact Witness Statements"*, 13 May 2008, ICC-01/04-01/07-475; Appeals Chamber, *Judgment on the appeal of Mr Germain Katanga against the decision of Pre-Trial Chamber I entitled "First Decision on the Prosecution Request for Authorisation to Redact Witness Statements"*, 13 May 2008, ICC-01/04-01/07-476; Appeals Chamber, *Judgment on the appeal of Mr Mathieu Ngudjolo against the decision of Pre-Trial Chamber I entitled "Decision on the Prosecution Request for Authorisation to Redact Statements of Witnesses 4 and 9"*, 27 May 2008, ICC-01/04-01/07-521.

⁶ Trial Chamber I, *Decision on victim participation*, 18 January 2007, ICC-01/04-01/06-1119; Appeals Chamber, *Judgment on the appeals of the Prosecutor and the Defence against Trial Chamber I's Decision on Victims' Participation of 18 January 2008*, ICC-01/04-01/06-1432.

9. **The Chamber addresses the following questions to the Prosecutor:**

- 1) Has the Office of the Prosecutor completed its investigation in the present case? If not, at what date does it intend to end the investigation?⁷
- 2) If the investigation is still ongoing, would its continuance entail the presentation of new pieces of evidence? If so, how many, what type (incriminating and/or exonerating) and in what form? To which charges and which modes of responsibility are they specifically directed?
- 3) How many incriminating pieces of evidence must still be disclosed to the Defence for the purpose of the trial? What type of items are they (statements, reports, photographs, videos, etc.)? To which charges and which modes of responsibility are they specifically directed? On what date will they be disclosed? Is a translation available in the Court's other working language?
- 4) How many exonerating pieces of evidence covered by article 67(2) of the Statute or rule 77 of the Rules must still be disclosed to the Defence? On what date will they be disclosed?
- 5) Has the Prosecutor specified to the Defence to which charge and/or to which mode of responsibility the exonerating pieces of evidence covered by article 67(2) of the Statute or rule 77 of the Rules and

⁷ Appeals Chamber, *Judgment on the Prosecutor's appeal against the decision of Pre-Trial Chamber I entitled "Decision Establishing General Principles Governing Applications to Restrict Disclosure pursuant to Rule 81(2) and (4) of the Rules of Procedure and Evidence"*, 13 October 2006, ICC-01/04-01/06-568.

disclosed following the *Decision on the confirmation of charges* were directed?⁸ If so, how?

- 6) Can the Prosecutor transmit to the Chamber an exhaustive list of the exonerating pieces of evidence covered by article 67(2) of the Statute or rule 77 of the Rules which it has already disclosed to the Defence after redacting them *proprio motu*?⁹ To which charges and to which modes of responsibility are they specifically directed? In which language were these documents disclosed to the Defence? Is a translation available in both of the Court's working languages?
- 7) Does the Prosecutor intend to apply to the Chamber for operational or procedural protective measures (including redactions)¹⁰ relating to the incriminating or exonerating evidence it plans to disclose soon? In relation to how many pieces of evidence will these measures be requested and by when?
- 8) Having reviewed the Prosecutor's most recent report on procedures initiated pursuant to articles 54(3)(e), 73 and 93 of the Statute,¹¹ the Chamber requests the Prosecutor to submit an accurate and up-to-date statement of the number and content of any documents or information obtained under article 54(3)(e) of the Statute in the present case?

⁸ Pre-Trial Chamber I, *Decision on the confirmation of charges*, 26 September 2008, ICC-01/04-01/07-716-Conf.

⁹ Pre-Trial Chamber I, *Decision on Evidentiary Scope of the Confirmation Hearing, Preventive Relocation and Disclosure under Article 67(2) of the Statute and Rule 77 of the Rules*, 18 April 2008, ICC-01/04-01/07-411-Conf-Exp; Pre-Trial Chamber I, *Corrigendum to the Decision on Evidentiary Scope of the Confirmation Hearing, Preventive Relocation and Disclosure under Article 67(2) of the Statute and Rule 77 of the Rules*, 25 April 2008, ICC-01/04-01/07-428-Corr.

¹⁰ See, in particular, Pre-Trial Chamber I, *Corrigendum to the Decision on Evidentiary Scope of the Confirmation Hearing, Preventive Relocation and Disclosure under Article 67(2) of the Statute and Rule 77 of the Rules*, 25 April 2008, ICC-01/04-01/07-428-Corr, para. 17.

¹¹ Pre-Trial Chamber I, *Prosecution's Twelfth Report on the Status of the Procedures Initiated Pursuant to Articles 54(3)(e), 73 and 93 in Relation to Those Items Identified as of a Potentially Exculpatory Nature or as Material to the Defence under Rule 77 of the Rules*, 6 October 2008, ICC-01/04-01/07-722.

- 9) What is the status of the steps taken by the Prosecutor to have the confidentiality restrictions on these documents or information lifted? In the event that requests for the lifting of confidentiality restrictions are rejected, what steps would the Prosecutor resort to?
- 10) How many witnesses does the Prosecutor intend to call at trial? To which charges and to which modes of responsibility is their testimony specifically directed? In which language are the witnesses expected to testify?
- 11) What is the length of the evidence on which the Prosecutor intends to rely?¹²
- 12) Do the witnesses include traumatised persons, children, elderly persons or victims of sexual violence for whom special measures will be required?¹³ If so, when does the Prosecutor intend to apply to the Trial Chamber for the special measures provided for under rule 88 of the Rules?
- 13) How many of the witnesses whom the Prosecutor intends to call at trial are already participating in the Court's protection programme? Are any requests for protection pending? If so, how many? Are any new protective measures envisaged?
- 14) Can the Prosecutor transmit to the Chamber at short notice the summaries of witness statements, witness interview notes and transcripts disclosed to the Defence further to the decision issued by the Single Judge on 25 April 2008?¹⁴ In what language were these

¹² Regulation 54(c) and 54(d) of the *Regulations of the Court*.

¹³ Rule 88 of the Rules.

¹⁴ Pre-Trial Chamber I, *Corrigendum to the Decision on Evidentiary Scope of the Confirmation Hearing, Preventive Relocation and Disclosure under Article 67(2) of the Statute and Rule 77 of the Rules*, 25 April 2008, ICC-01/04-01/07-428-Corr, paras. 110 *et seq.*

summaries transmitted to the Defence? Is a translation available in the Court's second working language?

- 15) Does the Prosecutor intend to request protective measures for witnesses he does not intend to call as prosecution witnesses, but whose statements are considered by him to be covered by article 67(2) of the Statute and rule 77 of the Rules? If so, what would these measures be?

10. The Chamber addresses the following questions to Counsel for the Defence:

- 1) Does the Defence have any observations to make concerning the conditions of detention of the accused?
- 2) Does the Defence intend to conduct investigations in the territory of the Democratic Republic of the Congo? If so, when will the investigations begin and how long will they last?
- 3) Can the Defence indicate to the Chamber the number of documents redacted *proprio motu* by the Prosecutor¹⁵ for which it will request the reinstatement of the redacted passages?
- 4) Can the Defence indicate to the Chamber the number of summaries of witness statements, witness interview notes and transcripts for which it intends to obtain the original version?¹⁶

¹⁵ See Pre-Trial Chamber I, *Decision on Evidentiary Scope of the Confirmation Hearing, Preventive Relocation and Disclosure under Article 67(2) of the Statute and Rule 77 of the Rules*, 18 April 2008, ICC-01/04-01/07-411-Conf-Exp and Pre-Trial Chamber I, *Corrigendum to the Decision on Evidentiary Scope of the Confirmation Hearing, Preventive Relocation and Disclosure under Article 67(2) of the Statute and Rule 77 of the Rules*, 25 April 2008, ICC-01/04-01/07-428-Corr.

¹⁶ Pre-Trial Chamber I, *Corrigendum to the Decision on Evidentiary Scope of the Confirmation Hearing, Preventive Relocation and Disclosure under Article 67(2) of the Statute and Rule 77 of the Rules*, 25 April 2008, ICC-01/04-01/07-428-Corr, paras. 110 *et seq.*

- 5) When will the Defence be able to indicate to the Chamber, albeit for information purposes, the number of pieces of evidence it intends to present at trial and the time it will require to present its evidence?

11. The Chamber addresses the following questions to the Prosecutor and Counsel for the Defence:

- 1) Can the Prosecutor and the Defence specify to the Chamber the date on which they will be ready for the commencement of the hearings on the merits?
- 2) Can the Prosecutor and the Defence now agree that facts alleged in the charges, the contents of a document, the will-say evidence of a witness or other evidence are not contested? If so, is there a summary of undisputed facts?¹⁷ If not, do they intend to meet for this purpose, and when?
- 3) Are the Prosecutor and/or the Defence considering submitting to the Chamber facts of common knowledge of which the Chamber may take judicial notice?¹⁸
- 4) Do the Prosecutor and the Defence intend to instruct expert witnesses at trial?¹⁹ If so, would they consider jointly instructing expert witnesses or, at the very least, using common witnesses that they would instruct separately?

¹⁷ Rule 69 of the Rules.

¹⁸ Article 69(6) of the Statute.

¹⁹ Regulation 54(m) of the *Regulations of the Court*.

12. The Chamber addresses the following questions to the Legal Representatives of the victims:

- 1) Do the legal representatives of the victims intend to lead evidence pertaining to the guilt or innocence of the accused?²⁰
- 2) If so, do they intend to apply for protective measures?
- 3) Does this evidence include testimony from traumatised persons, children, elderly persons or victims of sexual violence for whom special measures will be required?²¹ If so, when do the Legal Representatives intend to apply to the Chamber for the special measures provided for under rule 88 of the Rules?
- 4) Do the Legal Representatives of the victims intend to call witnesses and lead evidence pertaining to the issue of reparations at the same time as for the purposes of trial?²²

13. The Chamber addresses the following questions to the Prosecutor, Counsel for the Defence and the Legal Representatives of the victims:

- 1) Do the participants have any observations to make concerning the evidence disclosure system established by Pre-Trial Chamber I?
- 2) Do the participants intend to propose amendments to the eCourt protocol for the provision of evidence, material and witness information in electronic version that was used at the confirmation hearing?

²⁰ Trial Chamber I, *Decision on victims' participation*, 18 January 2007, ICC-01/04-01/06-1119; Appeals Chamber, *Judgment on the appeals of The Prosecutor and The Defence against Trial Chamber I's Decision on Victims' Participation of 18 January 2008*, 11 July 2008, ICC-01/04-01/06-1432, para. 94.

²¹ Rule 88 of the Rules.

²² Regulation 56 of the *Regulations of the Court*.

- 3) Do the participants have any observations to make concerning the place of the trial? Do they consider that a site visit to Bogoro by the Chamber could afford a greater understanding of the case? If so, should such a visit take place before the commencement of the hearings on the merits or in the course of the hearings?

14. **The Chamber addresses the following questions to the Registry:**

- 1) Has the Registry received new applications for participation from victims? If so, when will it transmit to the Chamber the report provided for in regulation 86(5) of the *Regulations of the Court*?
- 2) Are there any applications for protective measure under review? If so, how many are there and how soon does the Registry intend to respond to them? Would the current insecurity in Ituri influence the implementation of such measures?

FOR THESE REASONS,

The Chamber **ORDERS** the participants and the Registry to file their Written Responses no later than 24 November 2008 at 4.00 p.m.

Done in English and French, the French version being authoritative.

**Judge Bruno Cotte,
Presiding Judge**

[signed]

Judge Fatoumata Dembele Diarra

[signed]

Judge Fumiko Saiga

Dated this 13 November 2008,
At The Hague, The Netherlands